No. 11350.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,

Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and IGNATIUS F. PARKER, Trustee of the Estate of Bankrupts,

Appellees.

REPLY BRIEF OF APPELLANT.

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Statement of the Case.

Appellees in their brief in making Statement of the Case, on pages 1 and 2 thereof, contend that the absence of the minor from the homestead, beginning shortly prior to the hearing before the Referee, September 28, 1944, "was only temporary". But this is contrary to the testimony of the mother [Tr. pp. 86-87]; and the findings of the Referee [Tr. pp. 33-34], made December 31, 1945, showing such removal of the minor to be of a permanent character, and not "only temporary", as claimed by Appellees.

As the facts as set out in Appellant's Statement of the Case is not controverted, except as above, nothing further need be stated under that head.

ARGUMENT.

I.

A Homestead Exists Only Under and by Virtue of Statutes Creating and Regulating Them.

The Cook homestead was declared and recorded in June, 1940. Section 1238 of the Civil Code of California, as far as it affects this homestead, then read:

> "If the claimant be married, the homestead may be selected from community property or the separate property of the husband or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife."

Section 1239 provides for the consent of the wife and her joining in the declaration, if selected from her separate property. This was done by the Cooks, both joining in the declaration. This was a homestead for the husband and wife, and carried with it the right of survivorship, a legal and valuable right. Nothing is said in the statute about a "family" or "children"; their existence was not necessary to the establishment of this homestead by husband and wife, and the husband and wife constituted the family, with the right in each of survivorship. And minor children not being an element in the creation of such a homestead, would not be an element in its dissolution. In case of death, the surviving husband or wife took the property. In case the husband and wife wished to abandon the homestead or convey it for any reason, they had the absolute power to do so. Also in California where a

divorce takes place without any mention in the decree or disposition of the homestead or the real property on which it is declared, there is an "abandonment" of the homestead, as laid down in numerous California cases cited in Appellant's opening brief. The "family" is broken up and terminated and necessarily the homestead becomes abandoned and terminated.

There is another part of Section 1238, following the above quoted paragraph, which does indirectly relate to a "minor", among a class set up by Section 1261 of the Civil Code, which reads as follows:

> "When the claimant is not married, but is the head of a family, within the meaning of section 1261, the homestead may be selected from any of his or her property."

Section 1261 mentions "a minor" as among the class of persons, living with and supported by the head of a family. But that means a different and other selection and declaration of homestead, by a claimant who is not married. George O. Cook became a single or unmarried person when the final decree was entered, and might then have been eligible to select and declare a homestead, but he did not do so. But not on the separate property of his former wife.

From a careful consideration of the provisions of Section 1238 of our Civil Code, it seems evident that the contention of Appellees that the "family" for whose benefit the homestead was originally selected, "included Mr. and

Mrs. Cook, and their minor children", is erroneous. It might be true in a lay sense, but not in law. It is only when an unmarried person, as the head of a family, selects a homestead and bases his declaration upon the fact that a "minor child" resides with and is supported by him, being a necessary element of his declaration, can it be considered that the homestead was declared for the benefit of himself and his minor child, and as a part of his family.

The case of *City Store v. Cofer,* 111 Cal. 482, cited in Appellees' brief at page 5, was decided in 1895, and the *Zanone* and *Lang* cases in 1920, and so far as there is a conflict between them, the later cases would control.

In the last paragraph of Appellees' brief, on page 5, it is stated:

> "The nearest case, apparently, is the Lang case, *supra,* in which the Court lays down the rule that *in the absence of any minor child* a homestead is vacated by a decree of divorce in which the property is not mentioned."

We submit that this is a misconstruction of the *Lang* case and that no such rule was laid down in that case, as "in the absence of a minor child" etc. and this will be shown by even a casual examination of that case. The *Lang* case is fully analyzed in Appellant's opening brief.

II.

No Vested Rights in Minor to Survive After Divorce of Parents.

> "It is obvious that the declaration of homestead neither created nor vested any present title or interest in the minor son at the time the declaration was made and that any interest to which he might become entitled would be by virtue of the provisions of section 1265 of the Civil Code, *i. e.,* by succession as an heir."
>
> *Gerlach v. Copeland,* 212 Cal. 758, 760.

As death did not intervene, while the Cooks were husband and wife, the minor daughter never had or acquired that interest. But a divorce took place between the Cooks, under the circumstances of that case, already related, which made the parents of the minor single persons, and remitted each to his former status of owners of the property covered by the homestead, destroying at the same time the right of survivorship as to the homestead, and the homestead itself; then how could the exemption rights of either parents, existing before the divorce, be preserved by the residing of a minor child, who has no vested interest in the homestead, with either of her parents. Appellees' contentions in this respect are erroneous.

And the further fact that George O. Cook, in whose behalf this contention is made, was the party at fault in the divorce case which was granted on the ground of extreme cruelty, the custody of the minor awarded to the mother, and the father ordered to pay a weekly sum for her keep and maintenance would be against such contention, as he was not then the head of a family. (*Holcomb v. Holcomb,* 18 N. D. 561, 120 N. W. 547.) We hold no brief for the mother, the other bankrupt, but say that

she also lost her homestead right by the divorce; however, it seems an unholy argument that the guilty party could have his minor daughter live on the homestead property with him for a time, and then claim by this transient fact, that the homestead is his to enjoy with his second wife, without let or hinderance, while his wife and his creditors cool their heels in some distant place.

Or is it the contention of Appellees that both of the bankrupts, now single persons, have the same homestead rights they had before the divorce, and can live in this house together, or with the minor daughter and also with the second wife; in fact would have a legal right to do so? We do not think that the law should be so construed as to countenance this arrangement. As was said in the case of *Skinner v. Walker,* 98 Ky. 729:

> "The joint occupancy and enjoyment of the homestead by the man and woman, became utterly impractible after the severing of the marital relations, and that certainly was not contemplated by the legislature."

Nor do we think that such an arrangement was ever contemplated by our legislature or the Courts in construing a case such as here presented. We submit that the judgment should be reversed with appropriate instructions and requested in Appellant's opening brief.

Respectfully submitted,

James P. Clark,

Attorney for Appellant.